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# In the Supreme Court of the United States

OCTOBER TERM, 1924

A. J. OLIVER, AS TRUSTEE IN BANKRUPTCY of the Estate of West Coast Rubber Corporation; Oscar Courtin, Dorothy E. Knight, et al., petitioners,
*v.*
THE UNITED STATES OF AMERICA AND CITY and County of San Francisco

No. 180

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### STATEMENT OF THE CASE

On January 22, 1922, the West Coast Rubber Corporation was adjudicated a bankrupt. Subsequently a trustee in bankruptcy was chosen. The United States filed with the trustee in bankruptcy its claim for taxes due by the bankrupt. Similar claims were filed by the City and County of San Francisco. Claims were also filed by the individual petitioners herein for wages due them by the bankrupt. The estate was inadequate for the payment in full of the claims of the United States, the City and County of San Francisco, and these labor

claimants. In that situation, the referee in bankruptcy held that the labor claimants were entitled to payment of their claims in full before payment of the tax claims of the United States and of the City and County of San Francisco. The opinion of the referee in bankruptcy appears on pages 35–50, inclusive, of the transcript record.

Upon a petition for review of the referee's order presented to the District Court of the United States for the Southern Division of the Northern District of California that court affirmed the order of the referee. The opinion of the District Court appears at page 57 of the transcript of record.

The Circuit Court of Appeals for the Ninth Circuit, upon a petition to revise the order of the referee as affirmed by the District Court, reversed that order and held that the tax claims were entitled to priority over the claims for wages.

The statute involved is section 64 of the Bankruptcy Act of 1898 (30 Stat. at L., 563), which reads as follows:

> Sec. 64. *Debts which have priority.*—*a.* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

*b*. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

*The sole question is whether under this section taxes or wages have priority.*

## I

### ARGUMENT

### Section 64 gives taxes priority over wages

First of all, of course, the intention of Congress is to be sought from the words employed in section

64. The section was given the heading, *"Debts which have priority."* Normally the function of a section heading is to indicate the subject matter of the section. The heading employed here, therefore, indicates that the section is to deal with such debts as shall have priority in order of payment out of the estate of the bankrupt. Following the heading the section is subdivided into two parts (*a* and *b*). Normally such a subdivision indicates that the subject matter of the section as a whole—here, *Debts which have priority*—is to be dealt with under two general divisions of " debts," classified according to some principle, and normally, also, that as in each class the kinds of debts are stated in their order of priority, so the general classes of debts are stated in their order of priority, and class *a* would have priority over class *b* debts. In short, *the framework employed here by Congress in building Section 64 indicates that " taxes " are treated therein as debts entitled to priority over " wages."*

But not only the framework of Section 64 indicates the intention of Congress as to the priority of taxes. *The positive injunction of subdivision a of section 64 is that the " taxes " therein mentioned shall be paid " in advance of dividends to creditors."* The natural meaning of this language is that before anything at all is to be paid out of the estate to " creditors " (and of course the labor claimants in the present case are " creditors ")

the "taxes" due to the Government and the municipal corporations mentioned in the statute are to be paid. The word "dividends," as employed here, has its usual and ordinary meaning. It is not one of those words which by section 1 of the Bankruptcy Act of July 1, 1898 (30 Stat. L. 544) are given a restricted meaning, and the usual and ordinary meaning of the word "dividends" includes any payment whatever made in the distribution of the subject matter of the estate or property to be divided. Thus, the word is defined in the Standard Dictionary as—

> A sum of money, resulting from division, to be distributed according to some fixed scheme; as a *dividend* of assets *pro rata* among creditors.

So in *In re Barber*, 97 Fed. 547, 550, it was said:

> A dividend in bankruptcy is a parcel of the fund arising from the assets of the estate, rightfully alloted to a creditor entitled to share in the fund, whether in the same proportion with other creditors, or in a different proportion. I think I have indicated the general understanding of the meaning of the word "dividend," and I fail to discover anything in the act tending to show that it is used in any different sense. Section 64, relating to debts which have priority, strengthens my conclusion. That provides that the trustee shall pay all taxes "in advance of the payment of dividends to creditors." This would exclude taxes from the category of dividends, but nothing else.

To the same effect with the case just cited is the language of Woods, Circuit Judge, in his dissenting opinion in *Bird et al.* v. *City of Richmond,* 240 Fed. 545, 560:

> To restrict the meaning of "dividend" to payments made to unsecured creditors would not only distort the Act, but would mean that the Act had made no provision whatever for distribution of assets in the hands of the court belonging to secured creditors of the same class or different classes. The word "dividend" is not one of the words limited in its meaning by a definition contained in the Act itself, and hence it has its usual well-known meaning, per centum of payments made in the distribution of funds in the hands of the court to all creditors whose claims are before it. It is true it is more frequently used in the Act in connection with the distribution to unsecured creditors; but that is not controlling, for the same word or phrase has a different meaning in the same statute according to its association. *American S. Co.* v. *Commissioners,* 224 U. S. 491.

We quote this language because of what seems to us to be the very sound reasoning therein, although it is contrary to the dictum of the majority of the court in the same case.

Finally, in the present case, the Circuit Court of Appeal of the Ninth Circuit, as to the meaning of the term " dividend " in section 64a, said (see page 62, transcript of record):

> It is true that the term " dividends to creditors " ordinarily refers to dividends to

> general creditors. But it does not necessarily have that meaning. A dividend is that which is to be divided. In bankruptcy it is the sum of money which is to be divided among two or more creditors. It is not necessarily a partial payment. It is obvious that it may at times be a payment in full even as to general creditors. We think it is the intention of 64a to provide that taxes shall be paid before any payment is made to creditors, whether they be general creditors or preferred creditors. The power to levy and collect taxes is not only an indispensable attribute of sovereignty but it is absolutely necessary to the support of Government, the maintenance of law and order and the protection of life and property. It is not to be supposed that the power to tax would be subordinated to the claim of any creditor however meritorious that claim may be.

The petitioners here, and the referee and District Court below in this case, relied upon certain language used by this court in an opinion by Mr. Justice McReynolds in *City of Richmond* v. *Bird et al.*, 249 U. S. 174, 177:

> Section 64a directs that taxes be paid in advance of dividends to creditors; and "dividend" as commonly used throughout the Act means partial payment to general creditors.

But in that case the construction of the language of section 64a, "in advance of the payment of dividends to creditors," was in no wise involved. The language used, therefore, was *obiter dictum;* and

even as such it does not purport to construe the meaning of the word "dividends" as used in Section 64a, but says merely, in passing, that the word "dividend," as commonly used throughout the Act, "means partial payment to general creditors." Unquestionably it may be conceded that it is used in that sense generally throughout the Act, but certainly it would not necessarily follow therefrom that it is so used in section 64a, particularly when the context in which it is employed in Section 64a indicates that the word "dividends" is there used in its usual and ordinary meaning.

Still other language is employed in section 64a to indicate the intent of Congress that taxes are to have priority over wages. We refer to the phrase *"except as herein provided"* as used in the first clause of subdivision *b* of section 64. That clause is:

> The debts to have priority, *except as herein provided,* and to be paid in full out of bankrupt estates, and the order of payment shall be * * * .

The words *" except as herein provided "* can only refer to that which was provided in the preceding subdivision of the section, namely, subdivision *a*, since it is only that subdivision of the section which purports to refer to any other priority than those contained in subdivision *b*. These words show a clear recognition of the fact that subdivision *a* does create a priority and that that priority is to precede, at least, any priority of creditors created by

subdivision *b*. Certainly, the phrase "*except as herein provided*" normally would be held to refer to some other provision in the same section. Any doubt that it refers to what is contained in the preceding part of the section—that is to say, in subdivision *a*—will be wholly removed when the legislative history of section 64 is hereinafter discussed and the several stages of its evolution are consecutively set out. There will then be no doubt that this phrase refers only to the priority created in the preceding subdivision of the section.

The meaning of section 64, as it thus appears from the language employed, is consistent with the established public policy of the United States as to its prior right to payment of taxes due it from the estates of bankrupts. A clear reversal of that policy would be indicated by such a construction of section 64 as would subordinate taxes not only to wage claims but also to the claims described in clause 5 of subdivision *b* of section 64, to wit:

> (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

It would be hard indeed to explain why Congress would have intended to subordinate taxes due the sovereign *to any debt of the bankrupt whatsoever that any State might by law declare entitled to priority*. Such, however, is the necessary conclusion from the construction contended for in this case by petitioners. That the established public policy of the United States has always preferred taxes due

the United States over claims to creditors of bankrupt estates appears clearly from a consideration of the statutes preceding that of 1898 governing bankruptcy proceedings.

The first bankruptcy statute was that of 1800 (2 Stat. 19). Section 62 of that Act, the only section of the Act establishing any priority whatever, provided:

> That nothing contained in this law shall, in any manner, effect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them.

The second Bankruptcy Act, that of August 19, 1841 (5 Stat. L. 440), provided in section 5:

> That all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to re-

ceive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars: * * *.

The Bankruptcy Act of 1867 (14 Stat. 517) provided in section 28 thereof that:

> In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order—
>
> First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.
>
> Second. All debts due to the United States, and all taxes and assessments under the laws thereof.
>
> Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.
>
> Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.
>
> Fifth. All debts due to any persons who, by the laws of the United States are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided,* That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

It is clear from the foregoing that the construction of section 64 now urged by us is in conformity with each of the Bankruptcy Acts theretofore enacted by Congress, so far, at least, as concerns the question of whether taxes due the United States are entitled to priority over any demands of creditors.

## II

### The legislative history of section 64 indicates priority of taxes

Any doubt as to the intention of Congress that taxes should have precedence over wages in order of payment out of a bankrupt's estate will be removed by a consideration of the legislative history of section 64.

The *"Act to establish uniform laws on the subject of bankruptcy throughout the United States"* was introduced in the first session of the Fifty-fifth Congress by Mr. Lindsay, of Kentucky, as Senate bill 1035. It was referred to the Senate Committee on the Judiciary (vol. 30, Cong. Rec., 55th Cong., 1st sess., p. 118), and was reported favorably to the Senate without amendment (vol. 30, Cong. Rec., 1st sess., p. 155). In its original form, as thus introduced and thus reported, what is now section 64 (then section 65) read as follows:

> SEC. 65. *Debts which have priority.—a.* Debts owing to the United States, a State, county, parish being a political corporation, district, or municipality, after being proved

and allowed, shall have priority only in the event and to the extent that they constitute a lien upon the property of the estate.

*b*. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed $300 to each claimant; and (5) debts owing to any person which by the laws of the United States or a State are entitled to priority.

It will be noted that in its original form section 64 was in its present form exactly, except that in its original form subdivision *a* referred *not to taxes,* but to *debts* owing to the United States and various named political subdivisions, and provides that such *debts* should have priority " *only in event*

*and to the extent that they constitute a lien upon the property of the estate.*" Obviously, however, the word "*debts*" as used in the original form of subdivision *a* included "taxes." In reality, therefore, the only distinction between subdivision *a* in its original form and in its present form is that in the original form "taxes" or "debts owing to the United States" had priority over wages (and other claims mentioned in subdivision *b*) *only if they had become liens upon the property.*

The act as reported by the Senate Judiciary Committee was not adopted by the Senate. Instead, a substitute offered by Senator Nelson was adopted (vol. 30, Cong. Rec., 55th Cong., 1st sess., p. 801), the part thereof dealing with the subject matter of section 64 being as follows (vol. 30, Cong. Rec., 1st sess., p. 809):

> SEC. 9. That the following debts shall have preference, in the order named, over other debts in the distribution of the estate of the bankrupt, to wit:
>
> First. Debts due to the servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of said petition.
>
> Second. Taxes or revenues due the United States.
>
> Third. Taxes due any State or Territory or the District of Columbia.
>
> Fourth. Taxes due any county, parish, town, city, or village, in the order named.

> But none of such debts shall be recognized or paid unless duly proved and allowed, as prescribed in reference to other debts and claims against the bankrupt.

The Nelson substitute was sent to the House of Representatives, there referred to the House Committee on the Judiciary (vol. 30, Cong. Rec., 1st sess., p. 840), which committee reported in lieu of the Senate bill what was known as the Henderson substitute (vol. 31, Cong. Rec., 55th Cong., 2d sess., p. 233). The bill in this form was essentially the bill as originally introduced in the Senate by Mr. Lindsay, which, with some minor changes, made by a conference committee, was adopted and signed. So far as section 64 in concerned, it underwent no further changes after those made by the Henderson substitute.

When the Henderson bill was reported by the House Committee on the Judiciary, it was accompanied by an explanation, a part of which referred to section 64 (H. R. No. 65, 55th Cong., 2d sess., p. 27), which read as follows:

> Under the head of "debts which have priority" a provision is recommended requiring trustees to recognize, first, taxes due to the United States, State, county, district or municipality, to be paid before any dividend is paid to the creditors. *This to apply whether the taxes are a lien or not upon property.* [Italics ours.]

In other words, the committee explained that the priority in payment of taxes was not to be affected (as in the original Senate bill) by the fact that they had or had not become liens.

We have then before us the three stages in the evolution of this section:

1. The original Senate bill, in which, in subdivision *a* of section 64, priority is unquestionably given to "debts owing to the United States," provided they have become liens, and in which the phrase in subdivision *b* "*except as herein provided,*" clearly refers to the provision made in subdivision *a* as to the priority of the "debts" described in subdivision *a*.

2. The Nelson substitute, which unquestionably gave "wages" priority over "taxes."

3. The Henderson substitute, following the rejection of the Nelson substitute, reinstating section 64 as originally introduced, except that priority as to "debts" was limited to "taxes," and as to "taxes" was extended to include all taxes "even though not reduced to liens."

In short, the original Senate bill undoubtedly gave taxes priority over wages. The Nelson substitute undoubtedly gave wages priority over taxes. The final adoption of what was practically the original Senate bill, with but one change in section 64 thought worthy of explanation by the House Committee on the Judiciary (and that a change which improved the priority of taxes),

shows the clear intention of Congress that all taxes should be paid before wages.

This legislative history of section 62, moreover, shows beyond any doubt that the phrase in subdivision *b*, *" except as herein provided,"* refers to the priority set up in favor of the United States and the various political subdivisions named in subdivision *a*.

## III

### The decided cases give priority to taxes

The construction of section 64, indicated by the language used in it and by its legislative history, is the construction which has received the approval of the courts, including this court.

In *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.* (224 U. S. 152, 159), the court, speaking through Mr. Justice McKenna and referring to section 64, said:

> Labor claims are given priority, and it is provided that debts having priority shall be paid in *full. The only exception is " taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality." These were civil obligations, not personal conventions, and preference was given to them,* but as to debts we must assume a change of purpose in the change of order. (Italics ours.)

While the question involved in that case was as to whether wages had priority over debts, other than taxes, due the United States, and therefore

while the language quoted may be said to be *obiter dictum,* it nevertheless clearly presented the obviously carefully considered view of the court as to priority of taxes over all claims of creditors, a view which no language in later decisions of the court calls in question.

In addition to the language of this court in the *Guarantee Title & Trust Company* case, we have the decisions of the Circuit Court of Appeals for the Sixth Circuit, the Seventh Circuit, and, in the present case, the Ninth Circuit.

The Court of Appeals for the Sixth Circuit in the case of *City of Chattanooga* v. *Hill,* 139 Fed. 600, speaking through Lurton, Circuit Judge, said:

> *The priority of taxes is provided for by section 64a. If paid only as a secured debt of the kind referred to in 64b, taxes would be postponed not only to costs of administration but to workmen, clerks, and servants' wages.* Congress evidently meant that the sovereign should neither be postponed nor delayed in the collection of taxes, and therefore provided that the trustee should pay all taxes due and owing by the bankrupt in advance of dividends. (Italics ours.)

The Circuit Court of Appeals for the Seventh Circuit in *In re Jacobson,* 263 Fed. 883, speaking through Evans, Circuit Judge, said:

> If petitioner's claim is entitled to priority, it must then be by virtue of section 64a of the Bankruptcy Act. Its claim, being for a tax, is entitled to the preference and priority which this section provides. But

what is the priority thus created? Clearly priority over claims of other "creditors." This section directs payment of these taxes "in advance of the payment of dividends to creditors." "Creditors" of the bankrupt are not entitled to dividends until the taxes are paid. No recognition of priority in favor of taxes appears, except as to creditors. Who, then, are the "creditors" of whose claims Congress was speaking? Having defined the term "creditor" by a previous section, it was no doubt making use of its own definition, in thus using the term in section 64a. "'Creditors' shall include any one who owns a demand * * * provable in bankruptcy." Thus Congress by section 1, subd. 9, of the Act, comprehenively designates the class known as creditors, the class whose claims are subject to the claims of "the United States, State, county, district, or municipality" for taxes.

For the latest expression of the opinion of the Court of Appeals for the Seventh Circuit, see the Appendix herein.

The language of the Circuit Court of Appeals for the Ninth Circuit in the present case, holding that taxes have priority under Section 64 over wages, is set out in the transcript of the record on pages 61–63, inclusive.

In addition to the decisions by this court and by the Circuit Courts of Appeals just referred to, there have been numerous District Court decisions to the same effect. We refer to *In re Fountain*, 295 Fed. 873, decided by the District Court for the

Southern District of New York; *In re Waterman Mfg. Co.,* 291 Fed. 589, 594, decided by the District Court of Maine; *In re Kittenplan,* 285 Fed. 62, decided by the District Court for the Southern District of New York; *In re Anderson,* 275 Fed. 397, decided by the District Court for the Southern District of New York; *In re Weissman,* 178 Fed. 115, decided by the District Court of Connecticut; *In re Cramond,* 145 Fed. 966, 975, decided by the District Court of the Northern District of New York; and *In re Prince & Walter,* 131 Fed. 546, 549, decided by the District Court for the Middle District of Pennsylvania.

We quote from one of these cases only, the last of them to be decided, *In re Fountain, supra,* in which the question involved was identical with the one involved in the present case and in which the court said:

> In respect to the priority which taxes are given by section 64a of the Bankruptcy Act, I think it relates only to a priority over payments to creditors of the estate, and not over administration expenses. Subdivision "a," supra, directs the court to order the trustee to pay all taxes "in advance of the payment of dividends to creditors." These dividends to creditors embrace debts to preferred creditors as well as to general creditors. If, for example, the only creditors of a bankrupt estate were workmen entitled to a preference, the payment to them would be as much a dividend as one to general creditors, entitled to no priority. Section 1,

subd. 9, of the Bankruptcy Act (Comp. St. (§9585), defines "creditor" as including "any one who owns a demand * * * provable in bankruptcy." (Section 56b Comp. St. §9640) specifically defines as "creditors" persons "holding claims which are secured or have priority." I therefore reach the conclusion that subdivision "a" only gives priority to taxes as against debts (whether ordinary or preferred) due creditors of the bankrupt, but not as against necessary obligations of the receiver or trustee. This reasoning construes section 64 of the Bankruptcy Act as giving a preference to taxes over the items 4 and 5 of subdivision "b" but not over the items 1, 2, and 3 of subdivision "b"; that is, it gives taxes no priority over expenses of administration, but does give them priority over wage claims.

The Circuit Court of Appeals of the Third Circuit has held that administration expenses are entitled to priority in bankruptcy over taxes. *New Jersey* v. *Lovell* 179 Fed. 321; petition for certiorari denied 219 U. S. 587. The Circuit Court of Appeals of the Seventh Circuit recently reached the same conclusion. *Matter of Jacobson* (C. C. A.), 263 Fed. 883. My conclusion as to the priority of taxes over wage claims is in accord with the recent decision of Judge Knox in the case of *In re Kittenplan* (D. C.), 285 Fed. 62, and of the Circuit Court of Appeals of the Ninth Circuit in *West Coast Rubber Corporation,* 290 Fed. 160.

*Only one decided case* (in addition to the decision of the District Court in this case) presents a

view contrary to that supported by the great weight of authority as hereinabove indicated. That case is *In re Enterprise Brass Foundry* (293 Fed. 69), decided by the District Court of the Western District of Washington, opinion by Neterer, District Judge. The opinion is a single short paragraph in which the court held that wages had preference over taxes. In support of its decision the court cited the *Guarantee Title & Trust Company case, supra,* which as we have already seen, supports a conclusion directly the opposite to that for which it is cited by Judge Neterer.

The cases indicate a difference of opinion as to whether taxes have priority also over administration costs, but, except for the case mentioned, no difference of opinion as to the one question here, whether taxes have priority over wages. We do *not* concede that taxes do not have priority even over costs of administration, as some of the courts have held, but we are not here concerned as to that and do not debate it.

## IV

### The commentators on the Bankruptcy Act

All the text writers who have discussed the Bankruptcy Act assert that by it "taxes" are given priority over "wages." Without quotation, we refer to Remington on Bankruptcy (3d ed., sec. 2786), Brandenberg on Bankruptcy (4th ed., sec. 1347), Black on Bankruptcy (1914 ed., sec. 621), and Collier on Bankruptcy (4th ed., p. 972).

In support of their statements to the effect that taxes have priority in payment out of an estate of a bankrupt, these writers refer to the cases cited by us in Subdivision III of this argument.

## V

### CONCLUSION

We respectfully submit that the decision below should be affirmed. Clearly the intention of Congress—by section 64—was to give priority to tax claims either of the United States or any of the political subdivisions of the United States therein named. Such is the plain meaning of the language used in that section; the legislative history of the section corroborates that construction; the great weight of authority supports it.

JAMES M. BECK,
*Solicitor General.*
MERRILL E. OTIS,
*Special Assistant to the Attorney General.*
FEBRUARY, 1925.

## APPENDIX

At the January, 1924, session of the October, 1923, term, the United States Circuit Court of Appeals for the Seventh Circuit handed down its opinion in the case of *John C. Cannon, Collector,* v. *Frank M. McKey, Trustee in Bankruptcy.*

The case involved the exact point involved in the present case. After the decision of the case a petition for rehearing and stay of proceedings was filed. Proceedings were stayed pending the decision in this case by this court. For that reason the case has not been reported.

The opinion follows:

> EVANS, *Circuit Judge:* Does the claim of the Government for taxes take precedence, under the Bankruptcy Act, to wage claims?
>
> This is the sole question presented by the record before us.
>
> Much refinement of distinction over "taxes" and "debts" might be attempted, and the purpose of legislation preferring taxes, could be pointed out; but as we view this question, it is one of statutory construction with recognized objects and purposes as a background.
>
> Considering sections 3466 and 3186 of the Revised Statutes, as well as sections 64(a) and 64(b) of the Bankruptcy Act, the conclusion that taxes were placed ahead of all other debts, seems unadvoidable. The language of section 3466 admits of no exception.
>
> "Whenever any person indebted to the United States is insolvent, * * * the debts to the United States shall be first satisfied."

The Bankruptcy Act confirms this expression of public policy. Section 64(a) provides:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, * * * in advance of the payment of dividends to creditors, * * * ."

This provision not only is declarative of the policy of the Government respecting taxes due it, but lays down a rule of practice governing the distribution of the assets of a bankrupt estate. It provides the authority for those in charge to proceed, before questions of payment of dividends arise, to pay and to pay promptly the taxes due the sovereign.

The dividends referred to are not merely those payable to general creditors, but include any dividend. It is urged that a dividend is a partial payment of a claim, and does not contemplate a payment in full. Yet the Congress was speaking of dividends in the abstract, and the present case is an illustration of the possibility of a dividend being paid to a wage earner preferred by section 64(b).

Moreover, there is much of merit in Judge Gilbert's observation in *United States* v. *Oliver*, 290 Fed. 160:

"It is true that the term 'dividends to creditors' ordinarily refers to dividends to general creditors. But it does not necessarily have that meaning. A dividend is that which is to be divided. In bankruptcy it is the sum of money which is to be divided among two or more creditors. It is not necessarily a partial payment. It is obvious that it may at times be a payment in full even as to general creditors." These con-

clusions find support in the language of various decisions; for example, in *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152, the court said:

Labor claims are given priority, and it is provided that debts having priority shall be paid in *full.* The only exception is 'taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality.'"

In *In re Jacobson,* 263 Fed. 883, this court said:

"Sections 64a and 64b of the Bankruptcy Act are *in pari materia* with section 3466. Debts due the United States, other than taxes are not given the same protection in the two cited sections of the Bankruptcy Act as existed under the general statute, section 3466, or under the Bankruptcy Act of 1867."

See, also, *United States* v. *Oliver,* 290 Fed. 160; *In re Kittenplan,* 285 Fed. 62; *In re Weissman,* 178 Fed. 115; Remington on Bankruptcy, 2nd Ed., sec. 2190; Black on Bankruptcy, sec. 621.

The order is reversed with directions to enter a decree directing the payment of the taxes.

The conclusions herein reached were concurred in by Judge Baker before his death.

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